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Yew Kim Tan @ Yew Kim Lan (f) v Mallika i/k S Subramaniam (f) & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02–240 OF 2003
RAUS SHARIF, HASAN LAH AND SULONG MATJERAIE JJCA
28 AUGUST 2009

Contract — Breach — Agreement — Sale and purchase agreement — Failure to comply with terms of SPA — Whether non-compliance with terms of SPA amounted to fundamental breach of agreement — Whether plaintiff entitled to terminate SPA and claim damages

By a sale and purchase agreement ('the SPA') dated 2 July 1997, the plaintiff had agreed to purchase the defendants' property situated in Shah Alam ('the property'). Under the SPA, the sale was conditional upon the approval of the court under s 60of the Probate and Administration Act 1959 and the consent of the state authority to the transfer of the property to the plaintiff. Under the terms of the agreement the defendants had to apply for the consent of the state authority within 30 days from the date of the SPA, ie on or before 2 August 1997, and the approval of the state authority within six months from the date of the SPA, ie on or before 2 January 1998. The defendants did not submit the application for the consent of the state authority within the time stipulated. Nevertheless, despite the delay in making the application, the consent of the state authority was obtained on 30 December 1997, ie ahead of the time stipulated in the SPA. The plaintiff argued that the defendants' failure to submit the application for the consent of the state authority within the time stipulated under the SPA entitled the plaintiff to terminate the SPA. The plaintiff then terminated the SPA by a letter dated 22 December 1997 and commenced the present suit against the defendants wherein he sought, inter alia, a declaratory order that he was entitled to terminate the SPA, a refund of the deposit paid, damages, interest and costs. When the High Court dismissed the plaintiff's originating summons, he proceeded with the instant appeal.

Held, dismissing the appeal with costs:

Although the application for the consent of the state authority was made by the defendants outside the 30 days time frame as set out in the SPA, the said consent was nevertheless obtained within the time permitted in the SPA. As such, it was found that the breach was not a fundamental breach that went to the root of the agreement but a subsidiary or minor breach and that the remedy for such a minor breach was only damages. However, as the plaintiff in the present case was in occupation of the property, the delay in submission of the

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application for the consent of the state authority would not have any effect on the completion date. Further, the consent of the state authority was obtained on 30 December 1997, ie ahead of the time stipulated in the SPA. Hence the plaintiff suffered no loss, damages or prejudice due to the defendants' delay in submitting the application to the state authority. Accordingly the plaintiff could not treat himself as being free of his obligations under the SPA (see paras 11–14).

[Bahasa Malaysia summary

Melalui perjanjian jual beli ('PJB') bertarikh 2 Julai 1997, plaintif telah berjanji untuk membeli hartanah defendan-defendan terletak di Shah Alam ('hartanah'). Di bawah PJB, jualan adalah bersyarat atas kelulusan mahkamah di bawah s 60 Akta Probet dan Pentadbiran 1959 dan keizinan pihak berkuasa untuk memindah milik hartanah kepada plaintif. Di bawah terma-terma perjanjian defendan-defendan mesti memohon untuk izin pihak berkuasa dalam masa 30 hari dari tarikh PJB, iaitu pada atau sebelum 2 Ogos 1997, dan kebenaran pihak berkuasa dalam masa enam bulan dari tarikh PJB, iaitu pada atau sebelum 2 Januari 1998. Defendan-defendan tidak menghantar permohonan untuk keizinan pihak berkuasa dalam masa yang ditetapkan. Meskipun kelewatan dalam membuat permohonan, keizinan pihak berkuasa diperolehi pada 30 Disember 1997, iaitu dahulu daripada masa yang ditetapkan di dalam PJB. Plaintif menghujah bahawa kegagalan defendan-defendan untuk menghantar permohonan untuk keizinan oleh pihak berkuasa di bawah masa yang ditetapkan di bawah PJB memberikan hak kepada plaintif untuk menamatkan PJB. Plaintif kemudiannya menamatkan PJB melalui surat bertarikh 22 Disember 1997 dan memulakan tindakan ini terhadap defendan-defendan di mana dia memohon, antara lain, perintah perisytiharan bahawa dia berhak untuk menamatkan PJB, bayaran balik deposit yang dibayar, ganti rugi, faedah dan kos. Apabila Mahkamah Tinggi menolak saman pemula, dia meneruskan dengan rayuan ini.

Diputuskan, menolak rayuan dengan kos:

Walaupun permohonan untuk keizinan pihak berkuasa dibuat oleh defendan-defendan melebihi jangka masa 30 hari seperti yang ditetapkan di dalam PJB, keizinan tersebut walau bagaimanapun diperolehi dalam masa yang dibenarkan dalam PJB. Oleh itu, didapati bahawa kemungkiran bukan kemungkiran asas yang berbalik kepada dasar perjanjian tetapi kemungkiran subsidiari atau minor dan bahawa remedi untuk kemungkiran minor sedemikian hanya ganti rugi. Walau bagaimanapun, memandangkan plaintif dalam kes ini menduduki hartanah tersebut, kelewatan dalam menghantar permohonan untuk keizinan pihak berkuasa tidak mempunyai apa-apa kesan atas tarikh siap tersebut. Selanjutnya, keizinan pihak berkuasa diperolehi pada 30 Disember 1997, iaitu lebih awal daripada masa yang ditetapkan dalam PJB. Maka plaintif tidak mengalami kerugian, ganti rugi atau prejudis akibat

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kelewatan defendan menghantar permohonan kepada pihak berkuasa. Oleh itu, plaintif tidak boleh menganggap dirinya sebagai bebas daripada tanggungjawabnya di bawah PJB (lihat perenggan 11–14).]

Notes

For cases on agreement, see 3(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2573–2580.

Cases referred to

Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd [1996] 3 MLJ 675, CA (refd)

Legislation referred to

Probate and Administration Act 1959 s 60

S Ashok (Amarjeet Singh with him) (Zubeda & Amarjeet) for the appellant.
J Vicknaraj (Vicknaraj, R D Ratnam Rajesh, Kumar & Associates) for the respondent.

Raus Sharif JCA (delivering judgment of the court):

[1] This is an appeal against the decision of the High Court at Shah Alam in dismissing the plaintiff's originating summons.

[2] In the originating summons, the plaintiff had sought against the defendants for declaratory orders, inter alia:

(a) that the defendants had breached the sale and purchase agreement signed between the plaintiff and the defendants on 2 July 1997 ('the agreement');

(b) that the plaintiff was entitled to terminate the agreement; and

(c) that the defendants were not entitled to forfeit the deposit sum of RM75,500 and accordingly the said sum be refunded to the plaintiff with damages, interest and costs.

[3] Having heard arguments of the parties, we unanimously dismissed the appeal with costs. We now give our reasons.

[4] What had happened in this case was this. Under the agreement signed between the plaintiff and the defendants, the plaintiff had agreed to purchase and the defendants have agreed to sell a piece of land under HS(D) 1935 PT1, Jalan 11/2, Sek 11, Bandar Shah Alam, together with a double storey house

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thereon ('the property'). At the time of signing of the agreement, the plaintiff was in occupation of the property. The plaintiff was a tenant since December 1996.

[5] Under the agreement, the sale and purchase of the property was conditional upon the following:

(i) the approval of the sale by the court pursuant to s 60 of the Probate and Administration Act 1959 ('the Act'); and

(ii) the consent of the state authority to the transfer of the property to the plaintiff.

[6] Section 4.01(a) of the agreement provided that the application for consent of the state authority should be made by the defendants within 30 days from the date of the agreement. Section 4.01(c) of the agreement further provided that in the event that the application for consent of the state authority is rejected or if the approval is not obtained within six months from the date of the agreement, it shall be deemed to have been terminated. As the agreement was dated on 2 July 1997, the application for consent to the state authority should be made by the defendants on or before 2 August 1997 and the approval must be obtained on or before 2 January 1998.

[7] It was not in dispute that on 19 June 1997, and prior to the execution of the agreement, the defendants have sought for, and successfully obtained from the High Court at Kuala Lumpur the approval of the sale of the property pursuant to s 60 of the Act ('the order'). The sealed copy of the order was obtained by the defendants on 21 October 1997.

[8] It was also not in dispute that the defendants did not submit the application for the consent of the state authority within the time stipulated ie by 2 August 1997, but instead the application was made on 5 November 1997. Nevertheless, despite the delay in making the application, the defendant was able to obtain the consent of the state authority within the six months time as stipulated under section 4.01(c) of the agreement. The consent of the state authority was obtained 30 December 1997, ahead of the time stipulated ie 2 January 1998.

[9] It was submitted by learned counsel for the plaintiff before the learned High Court judge as well as before this court that the failure of the defendants to submit the application for the consent of the state authority within the time stipulated under section 4.01(c) of the agreement amounted to a breach which entitled the plaintiff to terminate the agreement and the plaintiff had in fact terminated the agreement by a letter dated 22 December 1997.

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[10] The learned High Court judge addressed the issue in the following manner:

> Setelah menimbangkan permohonan plaintif dan mengambilkira hujah kedua-dua pihak, saya berpendapat seksyen 4.01(a) PJB hendaklah dibaca bersama dengan seksyen 4.01(c) perjanjian tersebut. Kegagalan defendan membuat permohonan dalam masa (30) hari mengikut 40(1)(a) PJB adalah merupakan perlanggaran terhadap terma perjanjian 'subsidiary' sahaja dan tidak menyebabkan PJB tidak dapat diteruskan. Ia bukanlah satu perlanggaran terhadap terma utama atau fundamental. Di dalam kes ini kelulusan pihak berkuasa negeri telah diperolehi sebelum tempoh 6 bulan yang dipersetujui di dalam seksyen 4.01(c) tamat.

[11] We are in total agreement with the learned High Court judge. It is trite law that in every contract, there are some terms that are fundamental importance and others of less importance. Where the terms that has been flouted is fundamental to the contract, the innocent party is entitled to treat himself as being discharged from further obligation under it. But where the obligation that has been breached is only a subsidiary in nature, the innocent party may not treat himself as being free of his obligation under the contract, although he may sue and recover damages for the non-performance of the subsidiary term (see *Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd* [1996] 3 MLJ 675 (CA)).

[12] In the present case, it is our view that the breach was not a fundamental breach but a subsidiary or minor breach. Such minor breach do not give rise to the right of the plaintiff to terminate the agreement. Whilst it is true that the application for the consent of the state authority was made by the defendants outside the 30 days time frame as set out in section 4.01(a) the said consent was nevertheless obtained within the time permitted in section 4.01(c) of the agreement.

[13] The remedy for such minor breach is damages. However, in the present case, the plaintiff was in occupation of the property and as such the delay in the submission of the application for the consent of the state authority, would not have any effect on the completion date. This is especially so when the consent was indeed obtained within the six months period as required under section 4.01(c) of the agreement. Hence, the plaintiff suffered no loss, damages or prejudice due to the plaintiff delay in submitting the application to the state authority.

[14] At the end of it, we are of the view that the consequences of the breach complaint of by the plaintiff are not serious in the sense that they do not go to the root of the agreement. Accordingly, the plaintiff cannot treat himself as being free of his obligations under the agreement.

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[15] For the reasons given, we came to the conclusion that the appeal was devoid of merit and accordingly dismissed it with costs. After hearing the parties on costs, we fixed costs at RM5,000 to be paid by the plaintiff to the defendants. The deposit of this appeal was ordered to be paid to the defendants as part of the fixed costs.

Appeal dismissed with costs.

Reported by Kohila Nesan